

# **Montana's Water Compact & the USFS Organic Act's Impact on Headwater Drainages' Fuel Management**

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**Society of American Foresters' National Convention**  
Scientific & Technical Presentations: Wildfire, Rm A105

Hon. Montana State Senator Patrick O. Connell, CF

## **Members & Guests of SAF:**

The Fire Weather that we are all now experiencing throughout the West has dramatically challenged the paradigm of natural resource management of all lands, private and public. To be specific, our collective recent fire weather experience over the last 30 years simply demands a revised management approach toward public land management. Foremost, the Forest Service must revise its approach toward addressing both the risk and efficacy for wildfire management and control within Forest Plan revisions or amendments, down to the "Purpose and Need" statements of local project proposals.

## **Montana Background:**

Montana is a unique state: 1) its Constitution defines all water from "vapor" downstream to federally controlled navigable waterways as the property of the State of Montana, for the beneficial use of its citizens. 2) Montana has the headwaters leading to three different oceans. 3) Finally, Montana is the only State with a Water Compact with the US Forest Service, ratified in 2007.

## **Establishment of Organic Act & Montana Water Compact:**

Initially in the 1897 Forest Service Organic Act, the agency was established "...for the purpose of securing favorable conditions of water flows" Subsequently, the Supreme Court reaffirmed this fundamental charge in *US v New Mexico* (438 US 696). The Montana Water Compact, negotiated over 15 years and ratified in 2007 effectively subordinated the Agency to Montana's

Water Laws, as the Compact states: "Either Party may seek enforcement of the terms of this Compact in a court of competent jurisdiction (Article VIII, PartB, Title 85, Chapter 20 Part 14, MCA). Furthermore, at least within Montana in every drainage, there exist far more senior water right holders than that of the agency who depend on late season water flows for irrigation water, including the MT Dept of Fish, Wildlife & Parks that depend of these same late season waters for protection of their fisheries 'and recreational management. While the Compact may be unique for Montana, the principles therein apply to all western, arid states. Rest assured, under Montana State Water Law, a downstream water right holder will prevail against upstream behavior that impairs the quality, volume or timing of flow.

### **Evidence for Water Flow:**

Forestry has made numerous hydrologic/silvicultural analyses in the Intermountain West in the past decades that concluded vegetative management can significantly alter watershed runoff volume and timing. Most of the literature I've reviewed discussed this subject within the constraints of various silvicultural practices, along with topography and site aspect. Much less has been written about wildfire impact from 1<sup>st</sup> stage crown replacement fires. As a practicing Forester with over 4 decades of experiences in the Northern Rockies, I have observed that a clearcut caused by wildfire to stream's wetted perimeter in headwater drainages is far more damaging to the watershed than any silvicultural practice implemented following established "Best Management Practices".

### **Headwater drainage access:**

As a Forester who started his career working in the seasonal fire control, I believe that access has always been a dominate factor toward early and successful wildfire suppression. Access, and quick initial attack is the hallmark of the successful Montana State wildfire suppression record. Lack of reasonable access into headwater drainages causes a profound inability to safely allocate adequate resources for early fire suppression. This lack of access has been the justification to "pull back" fire suppression lines to the various Wildland Urban Interfaces, and let the backcountry burn. First, I do not support silviculture by fire. Second, the decision to

forego fire suppression in “up drainages” so as to protect residences placed on the WUI begs the Machiavellian dilemma: Are decades worth of water flow, and its timing more important, or subservient to the protection of individual residences?

### **The Climate Change Excuse:**

In recent years, the Forest Service is facing a more severe wildland fire suppression challenge than it has for decades. The agency has publically laid the cause for this at the door of Climate Change, at least during the active suppression of recent project fires within my State. In the 2017 Montana Climate Assessment, a product of the Montana Institute on Ecosystems ( based in both the University of Montana and Montana State University ), pinpoints the stark conclusion that “ Decreasing mountain snowpack will continue to lead to decreased streamflow and less reliable irrigation capacity during the late growing season”. I will add to that conclusion that these decreased stream flows concurrently damage fisheries and recreational opportunities as well. Bluntly, Montana’s two main economic drivers, Agriculture and Recreation are in the crosshairs to be negatively impacted by these severe seasonal wildfires.

### **The Responsibility for Water Delivery:**

So to meet the mandate of the Organic Act & the state Water Compact, I contend that the Forest Service must now acknowledge its responsibility for delivery of water for downstream Senior Water Right users both in Montana and further downstream. This must occur to protect season long water flows, and will be accomplished by addressing the management of headwater drainage vegetation and fire suppression techniques. Henceforth, both Forestry Management Plans and NEPA level document project “Purpose and Need” statements need to clearly identify that the delivery and timing of water flow is a fundamental goal of forest management, and of the specific project. Frankly, feel-good forestry terms like “reduction of sedimentation” or “fuel reduction” creates conditions and projects based on qualitative ideals that are not universally shared, and such issues are continually challenged in court. You don’t have late season stream sedimentation if you don’t have water flow! It is vitally important to recognize that the Organic Act’s charge for “securing favorable conditions of water flows” is

fundamental. The subsequent Congressional action such as the Multiple Use, Sustained Yield Act, National Forest Management Act, Endangered Species Act, and Healthy Forest Restoration Act do nothing to dilute its impact; rather, they sustain, and support the original directive establishing the agency.

### **Judicial Defense:**

On a more pragmatic note, resource management with a primary purpose to maintain seasonal water flows will be imminently easier to defend in court than many of the more “fuzzy” targets now used. The delivery of water is a fundamental purpose for the existence of the Forest Service, therefore a convincing legal argument for actions within headwater drainages can be predicated on the established 1978 ruling of the US Supreme Court reaffirming the Organic Act’s focus.

Attorneys General from the arid western states have a great interest regarding water for their states. While there is little incentive for them to intervene for protection of more subjective, “fuzzy” “Purpose and Need” statements, projects whose purpose is the protection and actual delivery of water is a subject that they can wrap their heads around. This would certainly increase the potential for vigorously supportive interventions to defend their states’ rights and the agency’s proposed vegetative management projects.

I do not subscribe to the notion that “doing nothing” is a suitable management choice to protect the historic land management *status quo* as frankly, it no longer works adequately for the Forest Service. There are three specific steps that the Federal agencies need to undertake:

- 1) Enact while either updating, or otherwise amend all current Forest Management Plans to clearly and vigorously identify that the delivery of water, and its timing of flow is a fundamental and primary purpose of the Forest.
- 2) Land management allocations ( Wilderness Study Areas, Roadless Areas and Travel Management Plans ) must be revisited in context with the environmental impacts of climate’s longer, drier, and hotter weather patterns, so as to evaluate the need for

access sufficiency for reasonable wildfire management and control in headwaters drainages.

- 3) At the project level, silvicultural prescriptions must be weighted by considering their efficacy toward maintaining an effective “hydrologic sponge” that releases its water throughout the seasonal period as well as its efficacy reducing conditions elevating wildfire risk.

### **Conclusion:**

What I am pointing toward is not a radical change in direction for the management of the Forest Service or BLM, rather, a return to recognizing and implementing the fundamental purposes that Congress established for these agencies. Yes, there will be folks that will absolutely pull out the stops to challenge such a re-focusing of management. Teddy Roosevelt in his famous March 26, 1903 speech to this body clearly stated that:

“You will be able to make that policy permanently the policy of the country only in so far as you are able to make the people at large, and then all the people concretely interested in the results in the different localities, appreciative of what it means; give them a full recognition of its value, and make them earnest and zealous adherents of it”

I submit for your consideration that water is *the* resource management purpose that allies all other uses of the public lands together.

# Montana State Senate



*The Treasure State*

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15 July 2018

Julie King, Supervisor  
Bitterroot National Forest  
and Responsible Officer for Gold Butterfly Project  
1801 N First Street  
Hamilton, MT 59840

Dear Supervisor King:

It is my pleasure and honor to comment on the DEIS for the Gold Butterfly Project, first, because a portion of the project falls within my Senate District, and will impact many folks; second, as Chair of the Legislative Water Policy Committee, and third, as a certified forester who has a *long* history involving the Bitterroot National Forest, and in general forestry throughout the State.

I attended the open house this past Tuesday, and this project, as well as the Forest was well served by the effort, and many issues were clarified and discussed.

To the silvicultural details of the analysis: it is comprehensive, detailed, and covers a very large amount of separate unit prescriptions and harvest method evaluations. I commend it breadth and scope. It will be absolutely imperative that the final EIS and subsequent harvest and service contracts allow adequate flexibility both to the Agency on-the-ground administrators, as well as to the project awardees, to respond to issues that will inevitably pop up in the execution of the different projects. What must be the compelling protocol is the *end result* on each separate block.

For the record, I support the Agency's proposed action, which includes some new road access construction. Simply put, the Agency's vegetative management responsibility requires access to accomplish its objectives throughout the landscape.

It becomes absolutely imperative for the successful defense and implementation of the Forest's proposed alternative that the Purpose and Need statement requires expansion. I support the four points presented in the DEIS; however, an additional specific statement is necessary to reflect the Agency's obligation to provide water for downstream users. Vegetative management practices can indeed impact both volume and *timing of flow* of water off headwater landscapes. So, too, can massive wildfires. It is a fundamental legal fact that the Agency, as established in the Organic Act of 1897 and subsequently re-affirmed in the landmark 1978 SCOTUS decision in *US v New Mexico* that the delivery of water is one of the two fundamental purposes for the existence of the Agency. For roughly the last 3 decades, the Northern Rockies have seen a drier and hotter summer weather cycle. In fact, the Agency's own public information folks have recently begun to point to this shift explaining the severity and issues surrounding wildfire behavior and suppression. Consequently, I would assert that the Agency must recognize this weather issue concerning the risks its watersheds face from large wildfires. While it is certainly factual that vegetation depends on moisture to survive, forest headwater drainages require a green and healthy timber stand to insure season-long delivery of water rather than just a spring rush that holds little benefit to the forest, or to downstream *Senior Water Right* holders. Including the appropriate language in your Purpose and Need Statement will substantially enhance the justification for the Agency's proposed alternative. Finally, Montana faces critical issues going forward regarding ground and surface water, as the Governor's Climate Change Review Committee has suggested. These issues include both volume as well as *timing of flow*. Historically, Montanans fight for water, and if water is a recognized primary purpose of this project, Montana could stand in defense of it.

Regards,

Senator Pat Connell, *Certified Forester*

Cc: Regional Forester  
John Bloomquist  
Montana EQC  
Montana Attorney General